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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 67.

NANCY CORINNE DYER and J. RAYMOND DYER,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION and
UNION ELECTRIC COMPANY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONERS' REPLY TO BRIEF OF SECURITIES AND EXCHANGE COMMISSION.

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SUMMARY OF ARGUMENT.

In reply to the brief of the Securities and Exchange Commission (herein called "SEC") petitioners oppose its suggestion that decision herein be deferred; point out the

error of its contention, voiced in support of deference, of the identicalness of both the issues and the mootness questions in the instant case and Case No. 15,989 below; show the conflicting mootness positions counsel for the SEC have taken in this case and the related cases referred to in the record here; show the unethical practices of SEC counsel, both herein and therein, in that connection; their factual misrepresentation herein, as shown by the record; their reference to material outside the record herein in order to impute an alleged admission against interest on the part of petitioners, unfounded in fact; the material omissions from the SEC's transcript of record as certified to the court below and their relation to the bona fides of the SEC's suggestion of deference; the SEC's failure to complete the perjury investigation it started herein and the relation of that failure to the bona fides of its said suggestion; and the aid its counsel, and the Solicitor General of the United States, are improperly seeking to afford Union Electric Company (herein called "Union") by the suggestion of deference contained in the Conclusion of their brief.

These matters are taken up in the following 10 points, to wit:

ARGUMENT.

1.

In its brief, page 7, the SEC urges this court to "defer disposition of the petition until the court below decides another case brought by the same petitioners, *Dyer v. S. E. C.*, No. 15,989, which is now before it and in which the identical question of mootness is involved."

In Case No. 15,939 the orders on review (Item 27, Exhibits A and C) are voidable. In the instant case the order

on review (Item 1, Exhibit A) is void. Oral argument was denied petitioners by the SEC herein (Pr. Rec. 28); due process was not accorded (*VIBC, Inc., v. FCC* (C. A. D. C. 1958), ... F. 2d ..., 26 L. W. 2663); hence, under Missouri law as well as under federal law, the order in the instant case is void. *Dougherty v. Manhattan Rubber Co.* (1930), 325 Mo. 656, 29 S. W. 2d 126, 128.

The 1958 stockholders' meeting in Case No. 15,989 could conceivably be held a mootness-causing intervening event, on the authority of the decision below. The hearing is set for September 12, 1958. But the 1957 stockholders' meeting in the instant case, since based on a void order, had no validity as an intervening event at all. The mootness questions involved are not identical at all.

2.

In support of its suggestion that this court defer disposition of this case the SEC, in its brief, page 8, states: "Should the court below overrule its prior decision on mootness, it might also consider vacating its judgment in the instant case, and then decide both cases on the merits."

Petitioners suggest that it is outside the jurisdiction of the lower court, and has been since March 14, 1958, when its mootness decision was handed down (Item 26), for it to "vacate its judgment in the instant case."

3.

Petitioners likewise suggest that to permit the mootness decision below to remain unreversed any longer than absolutely necessary could result in its continued spawning of untoward legal consequences. Three courts have already been misled. See *State ex rel. Dyer et al. v. Union Electric*

Co. et al. (St. L. App. 1958), 312 S. W. 2d 151; transfer denied June 9, 1958 by Supreme Court of Missouri, *Case No. 47,016;* and *SEC v. Dyer* (D. C. E. D. E. D. Mo. 1958), ... F. Supp ... (see Appendix A).

The decision below is clearly erroneous and should not be allowed to stand until the lower court, if it should so see fit, decides to try to do something about it. It was rendered sua sponte with no notice given or opportunity afforded to be heard on the mootness question, which question had not even been raised by the parties or by the court. Under Missouri law that is not due process. *Albert J. Hoppe, Inc., v. St. Louis Public Service Co.* (1950), 361 Mo. 402, 235 S. W. 2d 347. Nor is it under federal law, as this court knows.

In addition, in dismissing for mootness on the ground that the 1957 stockholders' meeting had been held, the lower court necessarily had to assume the validity of that meeting, which in turn depended on the validity of the order it had under review. It did so assume, thereby answering the very question before it on review. It decided it could not decide the case by deciding it. It abdicated its right of judicial review by exercising it. It held it had no jurisdiction under Art. III, Sec. 2 of the Constitution by assuming jurisdiction to decide that a valid meeting had been held.

Yet the order on which the validity of the meeting rested could not have been valid. *VIBC, Inc., v. FCC,* supra. None of the Commissioners who issued the order heard the oral argument, for though petitioners requested oral argument their request was denied (Pr. Rec. 28). The SEC order was entered by a nod of the head. Due process was violated by the SEC as well as by the court below. Yet, in effect, the court below ignored the SEC's denial of due process and held the meeting valid, a prerequisite to

its finding that the meeting constituted the mootness-causing intervening event. It is unreasonable for the SEC to ask this court to perpetuate that error, even for just a short time.

4.

The SEC's brief, page 8, referring to Cases No. 15,765 and No. 15,989, states: "The issues in the two cases, as petitioners have represented to the court below, 'are virtually the same and, for the most part, have already been briefed in Case No. 15,765.' "

Petitioners state that their alleged aforesaid representation to the court below is not in the record herein. It was lifted, out of context, from petitioners' (and intervenor-petitioner's) motion for extension of time within which to file their brief on the merits in Case No. 15,989, which motion was filed after the petition for writ of certiorari was filed herein. Having been lifted out of context the meaning of the alleged representation respecting the similarity of the issues in the two cases was distorted and changed. A comparison of the issues in the instant case, as shown by the petition for review below (Item 1), and the issues in Case No. 15,989 as shown by the petition for review therein (Item 27), shows their dissimilarity.

Petitioners state that by going outside the record herein to so quote petitioners, out of context, counsel for the SEC have sought to make this court believe that petitioners had made an admission against interest, an admission that because the issues in the two cases were the same this court might properly delay its action herein. Actually, it is petitioners' contention that the issues are dissimilar. And that is the contention of counsel for the SEC in Case No. 15,989, too, though they contend here that the issues "are virtually the same." In their May 6, 1958, brief in Case No. 15,989 (Item 39) they admitted the dissimilarity

of issues, stating, page 2: "It is our position that an extension of time for such purpose is not warranted. There is no justification for delaying the present review on the basis of what petitioners may do in the other case." They blow hot in Case No. 1. 989 on this dissimilarity of issues question, and cold here.

5.

The SEC's brief makes another factual misrepresentation. It states, page 8, that the "first time" the SEC was in a position to "express its disagreement" with the mootness decision below was when it opposed petitioners' application for a stay in Case No. 15,989. That was on April 17, 1958 (Item 29). Yet the SEC could have filed a petition for rehearing in the instant case any time within 20 days from the date the January 24, 1958, mootness decision herein was rendered (Item 19). Any time between February 12, 1958, when petitioners' petition for rehearing (Item 20) was filed below, and February 25, 1958, when that petition was denied (Item 21), the SEC could have filed its concurrence therewith. Rule 15 (c) of the court below did not preclude that, as the SEC's brief, page 8, fn. 4, asserts. That Rule, as pointed out in the petition herein, page 20, covers only responses, not concurrences. Indeed, the SEC could have expressed its disagreement to the court below any time up until the mootness decision was handed down, on March 14, 1958 (Item 26). Instead, it opposed stay of judgment, and on March 6, 1958, advised the lower court that it concurred in the court's decision that the instant case was "obviously moot" (Item 23). Thus, the SEC blew cold below, hot in Case No. 15,989 (Item 29), and is blowing luke warm here. Though it confesses the error of the court below it asks that the issuance of the writ herein be deferred.

6.

The SEC, by making said "first time" statement to this court, sought only, it is submitted, to save face. Actually, it has been working both sides of the street on this mootness question. In *SEC v. Dyer*, as shown by the opinion in that case (Appendix A), it took the position in connection with its attempted dismissal under Rule 41 (a) of the Rules of Civil Procedure that the case was moot. It stated in its May 8, 1957, brief to the U. S. District Court, page 6, which statement is quoted in the court's opinion, ... F. Supp. ... (see Appendix A), that "Since the meeting has been held and since the date has passed, it is submitted that the question of compliance with the order of February 27, 1957, is now moot." *SEC v. Dyer* is referred to in Pr. Rec. 106 as the SEC's injunctive action "in conjunction with Union" in the U. S. District Court in St. Louis.

Defendant in *SEC v. Dyer*, who is one of the petitioners here, filed his motion for a new trial therein, within time, alleging that fraud was perpetrated on the court by counsel for the SEC in order to achieve that dismissal for mootness. The allegation is supported by affidavit. The SEC filed no motion for a new trial, and the time for it to do so has passed. Nor has it filed any concurrence with defendant's motion, a procedure certainly open to it under the Rules and the law. It remains to be seen what it will do when defendant's motion for a new trial, which is pending, is heard. Oral argument has been requested by defendant. The order in *SEC v. Dyer* is shown in Appendix B.

7.

The same SEC counsel who perpetrated the alleged fraud in *SEC v. Dyer*, and who signed the May 8, 1957, brief in that case, signed the March 6, 1958, brief below (Item 23), the April 17, 1958, brief in Case No. 15,989 (Item 29), and

the June 11, 1958, brief to this court. They also signed the SEC's April 8, 1957, motion to dismiss the petition below (Item 5), alleging that petitioners were not "persons aggrieved," that their petition was "frivolous and was filed solely for delay," and contained "impertinent and scandalous allegations unsupported by the record." Yet certain items were missing from the record as certified to the court below by the Secretary of the SEC on May 6, 1957 (Item 7, Vols. I and II). The very items that petitioners alleged (Item 34, p. 7) proved Mr. McAfee's perjury were missing (Petitioners' Exhibits 11 and 21, Item 7, Docs. 41 and 47). They were not filed until September 25, 1957 (Item 7, Vol. III). In the "extended proceedings" referred to in the petition herein, page 14, which were necessary before the SEC could be induced to produce them, these same SEC counsel, and despite Rule 11 of the Rules of Civil Procedure, twice stated, falsely, that these missing Exhibits had been certified to the court below. See Items 9 and 12. The result was that petitioners' brief below (Item 15), and their printed record (Item 14), both due and filed August 20, 1957, and which the court had required be based on the original record as certified by the SEC (Items 10 and 13), could not refer to these missing exhibits. Another brief was required, which petitioners filed October 10, 1957.

8.

There is another factor which touches on the question of the good faith of SEC counsel herein. There were other omissions from the original record as certified to the court below by the Secretary of the SEC, which, though petitioners sought their inclusion (Items 8 and 11), have never been included in any record filed by the SEC below. These were the Post-Effective Amendments to Union's declaration, provided for in the order on review (Pr. Rec. 41). Nor were petitioners' Objections thereto ever included in

any transcript or other record filed by the SEC below. See Pr. Rec. 105. See Item 34, pp. 3, 4.

Union's Post-Effective Amendment No. 1 violated, petitioners contended in their Objections, Proxy Rule X-14A-9 (b). It was libelous of petitioner J. Raymond Dyer (Pr. Rec. 105). Union's Post-Effective Amendment No. 2 violated Proxy Rule X-14A-11 (H) (2) in that it falsely stated that the Harvard Law Record had consented to Union's "use of the previously published material as proxy soliciting material" when it had not, and had so advised both Union and the SEC. Yet the SEC approved these two Post-Effective Amendments, and expressly permitted them both to become effective (Pr. Rec. 105). It did not so notify petitioners, as it had formally stipulated in its order of March 15, 1957 it would (Pr. Rec. 101).

These two Post-Effective Amendments, and petitioners' Objections and the SEC's violation of its said formal notification order, formed the basis of defendant's defense in *SEC v. Dyer*. He pleaded "Lumbard's Law", as the pronouncement of Cir. J. Lumbard in *SEC v. May* (S. D. N. Y. 1955), 134 F. Supp. 247, 257, aff'd (C. A. 2, 1956), 229 F. 2d 123, came to be called in the *SEC v. Dyer* proceedings. "Lumbard's Law" is nothing more than the application of the doctrine of clean hands to proxy contests.

SEC Chairman J. Sinclair Armstrong, in his October 16, 1956, Introduction to Aranow and Einhorn's "*Proxy Contests for Corporate Control*" (1957), p. xviii, states: "We must be and are scrupulously neutral in proxy contests. We have no concern as to which side wins . . . The Commission does not go into court to help one side or the other in the contest, though that may be an ancillary result. The Commission goes into court only to protect the integrity of its rules and the public investor interests". The record in *SEC v. Dyer*, referred to in the record here (Pr.

Rec. 106) and shown by petitioner J. Raymond Dyer's affidavit (Item 34, pp. 3, 4) refutes that.

The same SEC counsel who signed the SEC brief herein are counsel of record in *SEC v. Dyer*. Four of them, at different times, appeared in the trial of that case. Defendant's affidavit there, filed in support of the fraud allegation voiced in his motion for a new trial, states that SEC counsel, being made aware, in a court suggested stipulation meeting with defendant, of his knowledge of the SEC's express approval of Union's Post-Effective Amendments Nos. 1 and 2, and of his contention of the applicability of "Lumbard's Law" to that express approval, thereupon, improperly and unethically, engineered the continuance that postponed the April 11, 1957, trial until after the April 20, 1957, stockholders' meeting, thus enabling the SEC, thereafter, to seek, and ultimately achieve, dismissal of its "abortive injunction proceedings" (Pr. Rec. 106), on the grounds of mootness occasioned by that intervening event.

9.

The Court below, though (Item 19) it considered the same, took no action on petitioners' motion (Item 16) that it refer the matter of Mr. McAfee's perjury to the U. S. Department of Justice. But the Department of Justice has had that matter before it since December 4, 1957. It has conducted an investigation (the FBI contacted petitioners' counsel in that connection), and on June 25, 1958, advised Congressman Clarence Cannon that it would let him know what conclusions it reached. It has not advised him further. The SEC "discontinued" its investigation in that connection on August 9, 1957, when it "dropped" the matter (Item 38).

It is suggested that if this case be remanded to the court below this court advise it what action it should take in

connection with petitioners' said motion (Item 16) concerning the referal of the McAfee perjury question to the U. S. Department of Justice with the request that the Department submit its findings to the SEC for use by petitioners in any further Union Electric proxy material proceedings there. The McAfee perjury is pertinent in Case No. 15,989 below, as well as in the instant case. Though the SEC confesses the error of the court below it makes no mention in its brief of petitioners' said motion to adduce additional evidence (Item 16), nor does it suggest what advices this court should give the court below in that connection should this case be reversed and remanded.

Petitioners also suggest that if this court defers its decision herein until after Case No. 15,989 has been decided by the court below, this question of perjury will very effectively have been removed from that case to the very great advantage of Mr. McAfee and Union's management in their future solicitation of proxies from Union's stockholders.

10.

Union, though notified of these proceedings and served with copies of the petition herein, filed no opposing brief. Yet it was granted leave to intervene below (Item 3). That leave was granted in an ex parte proceeding, in chambers, with no opportunity afforded petitioners to be heard.

When Union sought leave to intervene in Case No. 15,989 the matter was handled in open court. Petitioners opposed the intervention, as the order granting Union leave to intervene shows (Item 30). Union was not a "person or party aggrieved" under Sec. 24 (a) of the Holding Company Act, and sought only to defeat the review, nothing more.

Petitioners submit that Union, who speaks only through the SEC and the Solicitor General here, is not an inter-

venor as of right under Rule 24 (a) of the Rules of Civil Procedure. It was accorded only permissive intervention under Rule 24 (b). But neither in the instant case, nor in Case No. 15,989, does Union seek any affirmative relief, or make any "claim in addition to the issues in the main suit." Yet that is essential to intervention under Rule 24 (b). *Bernstein v. N. V. Nederlandsche-Amerikaansche etc.* (S. D. N. Y. 1948), 76 F. Supp. 335, 349; *Kind et al. v. Markham* (S. D. N. Y. 1945), 7 F. R. D. 265, 266; *Am. Optical Co. v. N. J. Optical Co.* (D. C. Mass. 1943), 3 F. R. D. 169, 170; *Owen v. Paramount Productions, Inc.* (S. D. Cal. 1941), 41 F. Supp. 557, 561. There must be some dissimilarity of issues on which to base an award of permissive intervention. *Mullins v. De Soto Securities Co.* (W. D. La. 1942), 2 F. R. D. 502, 504. That is likewise the Missouri law. *McNellis et al. v. Kansas City et al., Cross et al, Intervenors* (K. C. App. 1940), 143 S. W. 2d 477, 478.

Petitioners submit that if this court remands this case it should advise the lower court respecting the legality of its continued according of intervenor status to Union. That intervention unduly burdens petitioners, both in the instant case and in Case No. 15,989, and unduly prejudices "the adjudication of the rights of the original parties," contrary to Rule 24 (b).

Just why the SEC and the Solicitor General seek delay herein petitioners do not know. They can see no benefit accruing to the SEC or to the Solicitor General therefrom. Petitioners do, of course, see the great benefit that will accrue to Union's management if this court's disposition of the petition herein is deferred. If this court's decision is deferred until after the decision of the court below in Case No. 15,989, and if that court follows its decision herein, Union's management will be left free "to water Union's common stock to the extent of approximately $30,000,000, to the unjust enrichment of management to

that extent." That is the result pleaded in petitioners' verified application for a stay in Case No. 15,989 (Item 28), which application the court denied (Item 33).

That, petitioners believe, is why the SEC (Item 29) and Union (Item 31) so belatedly, but so insistently, confessed the error of the mootness decision below. They were opposing petitioners' stay application in Case No. 15,989. And in that stay application, heard April 17, 1958 (Item 32), petitioners pleaded (Item 28, p. 4) that, in view of the precedental effect of the mootness decision herein, they would be out of court unless the stay were granted, though approximately $30,000,000 in injury to the stockholders was involved, since the April 21, 1958, stockholders' meeting was coming up. To render that argument ineffectual both the SEC and Union contended that the mootness decision below was error, and that petitioners, if the court in Case No. 15,989 overruled its mootness decision herein, would not be out of court even though, before decision on the merits could be rendered, the April 21, 1958, stockholders' meeting should have been held. Which, presumably, was why the court, in its April 18, 1958, order denying the stay application, granted petitioners leave to brief and argue the mootness question in Case No. 15,989 (Item 33).

The record herein (Item 34) shows numerous allegedly improper activities on the part of the SEC in aid of Union, both in this case, in *SEC v. Dyer*, and in Case No. 15,989. There have been others, outside the record, which are under consideration by the House Subcommittee on Legislative Oversight. See Item 15, page 80, and Item 20, pages 13, 14. Petitioners submit that the Conclusion voiced by the SEC in its brief, signed by its counsel and by the Solicitor General of the United States, is of that class. The delay will benefit only the management of Union.

CONCLUSION.

The petition for writ of certiorari herein should be granted and the decision below should be reversed and remanded forthwith, without briefs or argument.

Respectfully submitted,

J. RAYMOND DYER,
Attorney for Petitioners.

APPENDIX A.

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Securities and Exchange Commission, Plaintiff, vs. J. Raymond Dyer, Defendant.	Cause No. 57C201 (1). Court No. 1.

Memorandum Opinion.

On April 9th, 1957, the SEC filed a complaint in this Court seeking equitable relief against J. Raymond Dyer. The Commission sought, in its carefully drawn pleading, a temporary restraining order and a preliminary and final injunction (1) against defendant's use of the mails or other instrumentalities of interstate commerce to solicit proxies, or otherwise engage in a solicitation, in connection with the April, 1957, shareholders' meeting of the Union Electric Company without first complying with an order of the Commission dated February 27th, 1957, and the rules of the Commission adopted pursuant to Section 12 (e) of the Public Utility Holding Company Act; (2) against defendant's use of the mails, or other instrumen-

talities of interstate commerce, to persuade, influence, or otherwise solicit Union's shareholders except in compliance with the law; and (3) particularly against defendant's use of the mails to distribute a postcard to Union's shareholders which contained the statement that defendant had filed objections in the United States Court of Appeals [for the 8th circuit] to the plaintiff's approval of certain proxy material distributed by the Union Electric management. This Court did not at that time, after receiving certain assurances from defendant, grant a temporary restraining order, nor did a preliminary injunction later issue.

On April 23, 1957, after the conclusion of the Union Electric shareholders' meeting, plaintiff filed in this action a notice of dismissal under Rule 41 (a). The Court, on motion of defendant, vacated this notice of dismissal on the ground that, although no pleading formally designed an "answer" had been served, the parties were, in fact, at issue on the allegations of the complaint, and that the time had passed when plaintiff could dismiss without leave of court or consent of the defendant. Plaintiff did not thereafter file a motion under Rule 41 (a) 2 seeking to dismiss its action by leave of court.

Defendant Dyer then filed, on April 26th, 1957, his Answer and Counterclaim (subsequently amended). Plaintiff's reply to the counterclaim challenged the jurisdiction of this court to grant the requested relief, i. e., order the SEC to conduct certain investigations of the alleged actions, associations and connections of persons related to the proxy contest at Union Electric. This Court accepted the Commission's view on the jurisdictional issue raised in the Reply, and has declined to vacate that ruling, despite the defendant's assertion that it is in error.

This present case is not the first occasion on which defendant Dyer and the SEC have met. Plaintiff's action in permitting certain proxy material of the Union Electric management for the same April, 1957, shareholders'

meeting to become effective was challenged by defendant in a petition for review filed in the Court of Appeals for this circuit. Dyer v. SEC, 251 F. 2d 512 (C. A. 1958), now pending in the United States Supreme Court on Dyer's petition for writ of certiorari. The Court of Appeals, having previously denied defendant a stay of a disputed order, heard argument on the petition for review subsequent to the conclusion of the shareholders' meeting and dismissed the proceeding as moot.

This Court does not see how a decree in this case could be of any more effect than the relief defendant sought in the litigation over the propriety of the Order of March 21, 1957. An examination of the prayer for relief in the Complaint will, the Court believes, show that a decree drawn within its confines could not affect the rights and obligations of parties as they now stand in any meaningful way. Although neither party took this view of the matter at the conclusion of the trial on the merits, plaintiff in its brief filed in support of its attempted dismissal under Rule 41 (a) 1 said:

> "The Commission could only ask your Honorable Court to enjoin solicitations to that date under the Order of February 27, 1957. It is submitted that this is so regardless of the results of any other legal proceedings in the District Court or in the Court of Appeals. If another meeting were to be required as a result of such litigation, it is submitted that the Commission would have to issue an order directed to said meeting. If the defendant were to persist in a solicitation of shareholders, he would have to comply with other rules of the Commission, not the Order of February 27, 1957. These matters would constitute other legal controversies because they are beyond the scope of the Commission's order of February 27, which is the sole subject matter of the complaint herein. Since the meeting has been held and since the date has

passed, it is submitted that the question of compliance with the order of February 27, 1957, is now moot."

A similar problem was before the Second Circuit in *SEC v. Okin*, 132 F. 2d 784, which on a set of pleadings apparently broader in scope, and in a continuing controversy, arrived at a different result. This Court does not believe that the instant case presents itself for any action other than dismissal for mootness.

An Order will be entered in accordance with this Opinion.

Dated this 28th day of July, 1958.

(signed) Geo. H. Moore,
United States District Judge.

APPENDIX B.

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Securities and Exchange Commission, Plaintiff, vs. J. Raymond Dyer, Defendant.	Cause No. 57C201 (1). Court No. 1.

Order of Court.

The Court having heard the evidence and arguments of the parties Doth Find that the instant cause is now moot and Doth Order that said cause be and the same is hereby dismissed as moot.

Dated this 28th day of July, 1958.

(signed) Geo. H. Moore,
United States District Judge.